UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE: WHOLESALE GROCERY PRODUCTS ANTITRUST LITIGATION	Court File No. 09-MD-2090 (ADM/AJB)
	Minneapolis, Minnesota
	June 6, 2011
	1:30 p.m.

BEFORE THE HONORABLE ANN D. MONTGOMERY

UNITED STATES DISTRICT COURT JUDGE

(MOTIONS TO DISMISS OR STAY)

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P R O C E E D I N G S

IN OPEN COURT

THE CLERK: All rise.

THE COURT: Good afternoon. Please be seated.

THE CLERK: The matter before the Court this afternoon is In Re: Wholesale Grocery Products Anti-Trust Litigation.

Counsel, would you please note your appearances for the record.

THE COURT: Start with the plaintiffs' table. Mr. Drubel.

MR. DRUBEL: Richard Drubel for the plaintiff class, Your Honor.

THE COURT: Mr. Magnuson.

MR. MAGNUSON: Hello, Your Honor. Kevin Magnuson of Kelley, Wolter & Scott for the plaintiffs.

THE COURT: Ms. Odette.

MS. ODETTE: Elizabeth Odette, Lockridge, Grindal & Nauen.

MR. MEREDITH: Joel Meredith, Your Honor.

THE COURT: Mr. Safranski.

MR. SAFRANSKI: Good afternoon, Your Honor. Stephen Safranski, Robins Kaplan for SuperValu, Inc.

MR. LOUGHLIN: Good afternoon, Your Honor. Charles Loughlin, Baker Botts, LLC on behalf of C&S

Wholesale Grocers.

MR. RIEHL: Good afternoon, Your Honor. Damien Riehl, Robins, Kaplan & Ciresi, also on behalf of SuperValu.

MS. McELROY: Good afternoon. Heather McElroy with Robins, Kaplan, Miller & Ciresi.

THE COURT: And, Ms. Moen, last.

MS. MOEN: Good afternoon, Your Honor. I am Nicole Moen, Fredrikson & Byron, on behalf of defendants C&S.

THE COURT: All right. Good afternoon, counsel. I have been out of the office for two weeks, arrived back -- planned one week and a family emergency I had to attend to in Connecticut. So I'm back and have had only about an hour or so to do a quick read of the briefs. Obviously, I will work through them more carefully after today's hearing, but rather than cancel the hearing, since I knew we had people coming from out of town, it made sense to hear argument on it at this time. But I may not be up to my usual level of preparation.

Mr. Safranski, am I to assume that you have the first -- since you are closest to the lectern, the first argument here for the defendants with regard to the arbitration aspects of the case?

MR. SAFRANSKI: Your Honor, with the Court's permission, I'd like to put a chart up on the document

camera?

THE COURT: Sure. Anything that makes it simpler for me is appreciated.

MR. SAFRANSKI: Okay. With that in mind, here we go.

THE COURT: It seems to me this was in your brief, too; was it not?

MR. SAFRANSKI: It was in the brief. You may recall the coming attraction, the motion to amend, we had a similar chart that we used; although, I think we tried to simplify things with this one.

Your Honor, this motion is a motion under the Federal Arbitration Act to enforce Arbitration Agreements entered by five of the plaintiff retail grocers in this litigation; King Cole Foods, Blue Goose Supermarket, Millennium Operations, JFM, Inc., and MFJ, Inc. All five of these plaintiffs are parties to Arbitration Agreements with either SuperValu, C&S, or in some instances with both defendants. And these agreements were entered as part of their wholesale supply relationships.

Now, each of the Arbitration Agreements at issue require arbitration of "any controversy, claim or dispute of whatever nature between the parties" and whether "such claim existed prior to, arises on or after the execution date of the agreement."

Each of these Arbitration Agreements explicitly incorporates the American Arbitration Association's commercial rules and provides that the arbitrator would determine gateway issues of arbitrability, including issues with respect to the scope, the validity, exploration, and other aspects of the agreement.

Now, earlier this year, these five plaintiffs came up with a strategy to try to get around arbitration hearings. The plaintiffs would, in effect, split their antitrust conspiracy claims such that retailers who had Arbitration Agreements with SuperValu would only sue C&S Wholesale Grocers, and those who agreed to arbitrate with C&S would only sue SuperValu. And yet at the same time, they would try to establish -- they were trying to prove their antitrust claims by showing the pricing terms that they got from a signatory defendant were anti-competitive. And at the same time, these plaintiffs want to be able to avoid the arbitration provisions that govern these supply relationships. And they want to do this not just on behalf of themselves, but on behalf of every other retailer in the Midwest and in New England that agreed to individual arbitration of their claims.

Now, a few of these arbitration plaintiffs, which I'm just going to refer to the five plaintiffs as "arbitration plaintiffs," but some of them simply ignored

their Arbitration Agreements and are pursuing claims against both signatory and non-signatory defendants alike. Now, this strategy that the plaintiffs have adopted would, in effect, render the Arbitration Agreements meaningless and is totally inconsistent with the Federal Arbitration Act.

Now, there is a number of issues that we've discussed in our brief, but I want to really spend today focusing on the two central dispositive issues in this motion.

Well, first, I'm going to outline the claims in the Arbitration Agreements at issue, and then I'm going to discuss equitable estoppel, which prevents the arbitration plaintiffs from doing exactly what they are doing, trying to thwart the Arbitration Agreements by suing only non-signatories. Because all five of these arbitration plaintiffs has an agreement with at least one of the defendants, if equitable estoppel applies, that's dispositive of the entirety of the motion.

Second, I'm going to discuss the plaintiffs' argument that their Arbitration Agreements are invalid or unenforceable because they cannot provide for class arbitration.

Now, there are three Supreme Court cases that have been decided in the last few years that pretty much dispose of that argument. One is *Rent-A-Center, West v. Jackson*;

second is *Stolt-Nielsen v. AnimalFeeds*; and third is *AT&T Mobility v. Concepcion*, which I will discuss in a moment.

But, first, I want to spend a little bit of time talking about what are the agreements and what are the claims at issue. Here's where the chart will be helpful.

Okay. So you see I have got the plaintiffs grouped according to the putative class that they represent according to the second amended complaint, then I identify the plaintiffs, and then I identify who they are asserting claims against and who they have got agreements to arbitrate with.

So you will notice that within the Midwest class and New England class there's D&G, Inc. and Deluca's, Inc., who are suing both defendants, and they don't have any arbitration rules. So no matter what happens in this motion today, the claims on behalf of those plaintiffs and of those putative classes are going to proceed. So the question here is what about these other plaintiffs who have Arbitration Agreements.

So, first, under D&G we have King Cole Foods, which has claims against both SuperValu and C&S, and it has an Arbitration Agreement with SuperValu, which is Exhibit 1 to our motion.

Below King Cole Foods we have Blue Goose; claims against both defendants. It has a 2008

Mediation/Arbitration Agreement with SuperValu, which is Exhibit 10 to our motion.

We have Millennium Operations. Now, Millennium Operations is one of the ones that tried to basically plead around its Arbitration Agreement. It has a claim only against C&S. It has an Arbitration Agreement with SuperValu from December of 2003, which is Exhibit 7 to our motion. Also, at the time of the Asset Exchange Agreement, it was, in effect, a party to Arbitration Agreements with C&S. You see, before the Asset Exchange, Millennium was a customer of Fleming Companies, which went bankrupt and sold its wholesale business to C&S in July of 2003. Millennium had Arbitration Agreements with Fleming as part of its Supply Agreements with Fleming. Those agreements were assigned to C&S in July of 2003. C&S and SuperValu entered the Asset Exchange Agreement, and those agreements were subsequently assigned to SuperValu in that transaction. But at the time of the Asset Exchange Agreement, it is clear that C&S had rights to an arbitration agreement with Millennium.

And, finally, we have MFJ Market and JFM Market, who also have been referred to as "Village Market." They are only suing SuperValu. They have Mediation Agreements and Arbitration Agreements that they originally entered with SuperValu in 1999 and 2001. Those agreements were assigned to C&S in the Asset Exchange transaction that's being

challenged in this litigation. So, again, at the time of the Asset Exchange, SuperValu was a party to Arbitration Agreements with these plaintiffs. And these plaintiffs acknowledge that, at a minimum, they have the same Arbitration Agreements with C&S, which is why they are not suing C&S.

THE COURT: Without going into the context of each individual Arbitration Agreement, what's the context for the Arbitration Agreements being signed? What time periods did that happen in?

MR. SAFRANSKI: Sure. I can tell you King Cole Foods was 2005.

THE COURT: What was the context, though?

MR. SAFRANSKI: Well, usually when SuperValu enters into either a supply agreement or retailer agreement with a retailer, it often, although not 100 percent --

THE COURT: Not always, okay.

MR. SAFRANSKI: -- it often enters into a mediation/arbitration agreement, which is a separately signed document, and it's executed contemporaneously with the supply agreement.

THE COURT: Without getting into the specifics of each one, that would be true of most of these, there was something else going on when the Arbitration Agreement was signed?

MR. SAFRANSKI: That is true.

THE COURT: Are some of these renewals of prior agreements or something?

MR. SAFRANSKI: Yes, some of them are renewals of prior agreements. In terms of specifics, I'm not quite sure which ones.

THE COURT: Okay. I was just trying to get the context.

MR. SAFRANSKI: But they are all basically entered contemporaneously with either a supply agreement or a retailer's agreement, which doesn't have the long-term specificity of a supply agreement, but it's a more general agreement that deals with the terms and conditions of the business.

THE COURT: But they all had ongoing business relationships with each other?

MR. SAFRANSKI: Yes.

Okay. So, now, our briefing addresses why some of these claims are directed against signatory defendants. I don't think I need to discuss that here because the bigger, more dispositive issue of the whole motion is equitable estoppel. It is undisputed that each of these five plaintiffs has an Arbitration Agreement with at least one of the defendants. And the real crux of the plaintiffs' position is they can plead around those agreements by suing

non-signatories under a conspiracy theory. In doing so, the plaintiffs are really trying to have it both ways because they want to be able to pursue claims of overcharges from the signatory defendant under their Supply and Retail Agreements. They want to prove those claims by relying on the pricing terms under those agreements and the data regarding the prices that they are going to get in discovery from those signatory defendants. And at the same time, they want to completely avoid having to comply with the arbitration provision that governed those Supply Agreements. And the rule of equitable estoppel simply does not permit that strategy.

We cited the Eighth Circuit's decision in *PRM Energy Systems v. Primenergy*, which was a 2010 case, and it sets forth the basic test for equitable estoppel. Two conditions have to be satisfied: First, the plaintiff needs to allege "substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories"; and, second, the concerted conduct must be "intimately founded in and intertwined with the agreement at issue."

PRM Energy has some interesting facts. In that case, the arbitration clause was covered in a 1999 agreement between the plaintiff, Primenergy, and PRM Energy. With PRM Energy it was a technology licensing agreement. And the

plaintiff brought various tort and unfair competition claims against both signatory and a non-signatory, a third-party named Kobe Steel. And the allegation was that the defendants entered into this unfair competition conspiracy intended to undermine the plaintiff's rights under the agreement that had the arbitration provision. And the Eighth Circuit held that equitable estoppel required arbitration against this claim against the third party because the complaint alleged concerted misconduct and that concerted misconduct was directed at the relationship, at the agreement that contained the arbitration provision.

And it's important to note that it found equitable estoppel even though the non-signatory, Kobe Steel, had no corporate relationship with the signatory. It had no contractual relationship with the plaintiffs. It was not mentioned in the contract containing the arbitration clause. And the third party had no role in the performance of that contract.

And the *PRM Energy* decision itself relies on an Eleventh Circuit case called *MS Dealer v. Franklin*, which is a case that the Minnesota Supreme Court has also cited and relied on. And that case applied to a conspiracy intended to overcharge the purchaser of a car under a service contract. And they applied it, even though the plain language of the arbitration agreement applied only to

disputes between the plaintiff and the dealership from whom the plaintiff bought the car. And the Eleventh Circuit says that equitable estoppel applies "when the signatory to the contract containing the arbitration clause raises allegations of substantially independent and concerted misconduct by both the signatory and one or more signatories to the contract." And it found dispositive the fact that the conspiracy claims against both the signatory defendant and the non-signatory defendants were "based on the same facts and inherently inseparable."

So let's look at this case. Here there's no question that the plaintiffs are alleging a single conspiracy, one single act of concerted and interdependent misconduct, which is the Asset Exchange Agreement and the ancillary non-compete provisions. And they say under their own complaint that that conspiracy is directed at and intertwined with the relationships which are part of the supply relationships that have the agreements contained in the arbitration clause.

The gravamen of their complaint is that these plaintiffs were overcharged under their Supply and Retailers Agreements with the defendant, which themselves are governed by the arbitration provision. They claim that really the principle objective of the Asset Exchange Agreement, according to the plaintiffs, was to allow the defendants to

overcharge them for groceries.

Now, I expect Mr. Drubel will get up here and he is going to argue, well, no, arbitration is just a matter of contractual intent and a party can't be required to arbitrate with a non-signatory. An important point here is that each of the five arbitration plaintiffs did consent to arbitration. And the whole point of equitable estoppel is that it comes into play when the plaintiff is trying to get around that agreement by suing a non-party, a non-signatory. By definition equitable estoppel is extending the contract beyond somebody who is, strictly speaking, a party.

The plaintiffs tried to distinguish *PRM Energy* by arguing that, well, in that case the licensing agreement at least anticipated that the signatory might enter into a sublicense with another entity, which turned out to be Kobe Steel. A couple things: First of all, the Eighth Circuit didn't say that was the only way in which an agreement to arbitrate could be intertwined with the claims. But it's also important that the Retailers Agreement and the Supply Agreements all also anticipate the assignment of those agreements to third-party wholesalers. And that's, in fact, what had happened in the transaction that the plaintiffs are challenging.

The plaintiffs rely heavily on *Ross v. American Express*, which is a 2008 case, which held that Ross -- that

AmEx could not use equitable estoppel to invoke the arbitration agreements of other credit card companies. That was an antitrust price-fixing case. For the Second Circuit the important part was AmEx didn't sign the cardholder agreements, is not mentioned in the cardholder agreements, and had no role in the performance of those agreements.

The important thing to note is that *Ross* is distinguishable because, as the Eighth Circuit pointed out in *PRM*, it's enough that there was at least some contemplation of third-party involvement in some capacity, even though it didn't mention the third party by name. The third party wasn't performing under the agreement. It didn't negotiate it.

But on a more fundamental level, *Ross* is distinguishable because here the Arbitration Agreements by the two would-be class representatives were actually exchanged in the Asset Exchange Agreement.

So Mr. Drubel is not going to be able to get up and say that, for example, the Village Market plaintiffs, JFM and MFJ -- he is not going to be able to say SuperValu didn't negotiate those agreements because it did. He's not going to be able to say SuperValu is not mentioned in that agreement because it was originally a SuperValu agreement. And what the plaintiffs are trying to do is challenge the very transaction that assigned that agreement to C&S. The

same thing is true with Millennium, which had acquired the Arbitration Agreement from Fleming and assigned it to SuperValu in the Asset Exchange.

Even the Supply Agreement, the current Supply Agreement between Millennium and SuperValu, mentions C&S by name and references the assignment of that agreement, the previous Supply Agreement from C&S to SuperValu.

Mr. Drubel is also probably going to get up and say, well, under *Stolt-Nielsen* the FAA just won't let you apply equitable estoppel to someone who has not agreed to arbitrate. And there's a couple of things why that's just simply not correct.

First of all, *Stolt-Nielsen* only dealt with the issue of whether an arbitration agreement that is silent with respect to class procedures can be interpreted to authorize class action. The court said it did not. Two years before -- I'm sorry, the year before *Stolt-Nielsen,* the Supreme Court decided the *Arthur Andersen v. Carlisle* --

THE COURT: *Stolt-Nielsen* was just last year, wasn't it?

MR. SAFRANSKI: Yes, 2010.

So in 2009, the Supreme Court decided *Arthur Andersen v. Carlisle* which tells us that, in fact, the FAA permits the application of equitable estoppel authorized by state law. And *Stolt-Nielsen* itself entered arbitration

through the application of equitable estoppel in an antitrust case. So there is simply no basis to argue that *Stolt-Nielsen* somehow precludes the application of equitable estoppel.

Now I just want to turn to the plaintiffs' argument that, well, these agreements are all invalid. Their major response is that the agreements are unenforceable under Section 2 of the FAA because they don't allow class action procedures, and it's going to be too expensive to bring individual arbitrations. And to make that argument they're rely on an expert affidavit that they submitted with their response arguing that for each of these five arbitration plaintiffs, they are going to have to incur 1.4 million in expert costs looking at the same --

THE COURT: It doesn't envision any -- it starts with a new ramp-up time in each case, correct?

MR. SAFRANSKI: Well, that's the assumption. That is the major problem with it. But the Court doesn't even have to get there because the three Supreme Court decisions that I mentioned earlier completely foreclose this argument.

First is *Rent-A-Center, West v. Jackson*, a 2009 decision which held that a district court simply can't decide a claim that an arbitration agreement is unenforceable when the agreement itself assigns that decision to the arbitrator. Here all of the arbitration

agreements expressly assign to the arbitrator the --

THE COURT: The scope issues?

MR. SAFRANSKI: -- scope issues. They expressly say the arbitrator is empowered to decide the validity of the agreement.

Rent-A-Center is interesting. It involved an arbitration agreement between plaintiff and her former employer. The agreement, like this one, provided that the arbitrator would decide questions of enforceability. The plaintiff claims that certain procedural limitations in the arbitration agreement made it unconscionable. And the Supreme Court said because the agreement clearly assigned gateway issues to the arbitrator, the district court simply had to honor that assignment, that delegation of authority, and couldn't decide the enforceability issue.

And that is the same holding that this Court made in the *Barkl v. Career Education Corporation* case, which was decided late last year, where I believe it was -- that's in our opening brief, but that was an employment case. And the plaintiff wanted to avoid arbitration by arguing that the agreement was unconscionable and unenforceable for various reasons, and the court found that because the agreement incorporated the AAA rules, it didn't have to address the unenforceability issue.

Likewise, any suggestion that the procedural

limitations in the agreements themselves are rendered invalid, which is something that the Village Market recent affidavits have suggested, again, that's also for the arbitrator. And for that we can cite the *Bailey v. Ameriquest Mortgage* case by the Eighth Circuit in 2003 and also *PacifiCare v. Book*, another 2003 case from the Supreme Court.

Okay. But moving past that, *Stolt-Nielsen* also holds simply that the FAA forbids the imposition of class arbitration on parties where the agreement doesn't provide for it. Now, the important thing to note in *Stolt-Nielsen* is that in requiring arbitration class procedures, the arbitration panel was relying on exactly the same type of policy arguments to basically say, well, it wouldn't be effective from a public policy standpoint to have these arbitrations individually, so we were going to impose class arbitration. The Supreme Court simply rejected that and said the FAA doesn't permit it when the arbitration agreement doesn't provide for it.

And, lastly, the very recent decision in *AT&T Mobility v. Concepcion* addressed the core issues in *Stolt-Nielsen*, which is does the FAA permit an arbitration agreement to be invalidated because it does not provide for class arbitration. Again, the answer to that question is no. There the plaintiffs in that case, the Concepcions,

they bought mobile telephone service from AT&T based on the promise that they would get a free phone. AT&T, I guess, didn't tell them that they still had to pay sales tax on it in the amount, I think, of $30.22. So they brought a class action based on fraud and false advertising. But they had an arbitration agreement with a class action waiver. The court held that even when small dollar claims are at issue, the FAA does not permit courts to condition the validity and enforceability of arbitration agreements based on the availability of class procedures.

In fact, the lead case the plaintiffs rely on to support their argument that this agreement is unenforceable, the *AmEx* case from the Second Circuit earlier this year, is now in reconsideration and accepting supplemental briefs on how this is affected by the *Concepcion* case.

But, again, the Court doesn't even need to get to this issue because, again, the Arbitration Agreements provide the arbitrator is going to be the one to decide any arguments that the plaintiffs want to make regarding the validity and enforceability.

So the conclusion here is that the plaintiffs, who have agreed to arbitrate their disputes, shouldn't be participating in this case. They should be dismissed so that if they choose, they can participate, pursue their claims in arbitration as contemplated by the agreements.

THE COURT: Okay. If you're going to have any time left for rebuttal, I think you should probably be done now. Thank you, Mr. Safranski.

Mr. Drubel, are you the proponent of the plaintiffs' position today? I thought maybe it was going to be Ms. Odette.

MR. DRUBEL: Not today, Your Honor. Sorry about that.

THE COURT: Not today. Okay. No. Whatever.

MR. DRUBEL: Your Honor, we think there are four key issues for resolution of the defendants' motion in this case and all four of them are for the Court. One is, is there an applicable arbitration agreement? Two, is that arbitration agreement valid and enforceable? Three, what is the effect of any assignment of that arbitration agreement? And, four, does equitable estoppel apply?

Ms. Odette, could I have the first chart, please.

So I think that what I would like to do, Your Honor, is just -- because we think that these are the important issues for resolution of the defendants' motion, I think it's important to set forth the authority that these are all for the Court rather than, as Mr. Safranski indicated at least for some of them, for the arbitrator.

The first one, is there an applicable arbitration agreement? We don't have any dispute. The defendants don't

dispute it. They say in their memorandum, their opening memorandum, a district court typically must resolve whether the parties have a valid agreement to arbitrate.

The second issue, is the arbitration agreement valid and enforceable? We cite here in our chart the *Express Scripts* case. And this is in response to the defendants' citation of *Rent-A-Center*, the case Mr. Safranski mentioned just a minute ago, in their reply brief. *Rent-A-Center*, the plaintiff failed to challenge the specific provision delegating the issue of arbitrability to the arbitrator. The Supreme Court held that the provision must be presumed valid unless it's challenged and, therefore, the issue of arbitrability goes to the arbitrator. However, the Supreme Court also noted, "If a party challenges the validity under Section 2 of the precise agreement to arbitrate an issue, the Federal Court must consider the challenge before or during compliance with that agreement under Section 4." That's 130 Supreme Court at 2778. And that's exactly what the plaintiffs have done here, Your Honor. And we have, in fact, challenged specifically the provisions of the arbitration delegation. That's on page 7, footnote 4 of our brief.

And the *Express Scripts* case is really the flip side of the *Rent-A-Center* case. *Express Scripts* is an Eighth Circuit opinion from 2008 in which precisely what the

Supreme Court is describing in *Rent-A-Center* as their hypothetical, because the plaintiff in *Rent-A-Center* didn't do that, didn't challenge the express delegation. And *in Express Scripts* the court, the Eighth Circuit in that case, said where the plaintiff had done both, had challenged the entire agreement, plus the delegation provision, that issue then goes to the court for resolution. And what they held was that a dispute as to whether the parties agree to arbitrate will be resolved by the district court, unless the parties clearly and unmistakably provide otherwise.

Here, Your Honor, there is no clear and unmistakable evidence that plaintiffs intended to delegate arbitrability where a stranger seeks to enforce the agreement, as C&S does with respect to some of these SuperValu arbitrations, or the assignor seeks to enforce rights that have already been transferred. As I said, that's in our brief. We have, in fact, attacked that. So this issue about validity and enforceability is for the Court, not for the arbitrator.

Could I have page 2.

The third key issue, Your Honor, is what is the effect of an assignment of the Arbitration Agreement? The Eighth Circuit in the *Koch* case held that a dispute over the validity and effect of a purported assignment is for the court. It's 543 F.3d at 464. And the reasoning of the

court is that if the arbitrator would have to look outside of the circumstances of the contract to decide the issue, as they would in connection with an assignment, that's not for the arbitrator. That is for the district court.

And as we will see when we come to analyzing who has got what Arbitration Agreements, the issue of assignment is very important in analyzing the Arbitration Agreements here. But that issue is also for the Court.

And, finally, the issue of equitable estoppel. It doesn't sound to me like Mr. Safranski today has said anything other than what's already in his brief -- namely, I think the defendants argue or recognize that this issue, equitable estoppel, is for the Court. So these four key issues we think will resolve the defendants' motion, and all of them are for this Court to decide.

Now let's go back to the first one, is there an applicable arbitration agreement.

Could I have the second chart up, please.

Now, this is a little different chart than what you saw from Mr. Safranski. What we had done is take on the first column the plaintiff and where they are located. On the second column we have what we have now learned are the actual Arbitration Agreements involved in this case, along with the dates, and also with whom the party agreed to arbitrate because, as we know from the Supreme Court's

decision in *Stolt-Nielsen* and other cases, a party can limit with whom they agree to arbitrate. So that you see, for example, with respect to King Cole, and Blue Goose, and Millennium, with respect to their SuperValu Arbitration Agreements, they agreed to arbitrate with SuperValu and any other SuperValu entity. Nobody agrees to arbitrate with C&S.

Now, we got some of the facts wrong about who had what Arbitration Agreement in the complaint, but that shouldn't matter for purposes of this motion because the subclass, which the two arbitration subclasses are defined in the complaint at paragraph 67, turns on the issue of whether or not a party in fact has an arbitration agreement with one of the defendants during the class period. So, for example, King Cole. We alleged in the complaint that they had no arbitration agreement. So Mr. Safranski's chart says, well, they don't have an arbitration agreement, then they must be suing heck, you know, both defendants. Well, that's not true. In fact, it turns out that they did have an arbitration agreement with SuperValu. So under paragraph 67 of the second amended complaint that puts them in Midwest arbitration subclass. And, therefore, and if you look on the fourth column over, the defendant that sued the Midwest arbitration subclass has only brought a claim against C&S.

The same is true for Blue Goose. Blue Goose we

didn't allege -- we alleged in the complaint incorrectly that they didn't have an arbitration agreement, but it turns out that they do, which supports the defendants' theory. I mean, they just need to look at their databases to figure out who they have arbitration agreements with. These retailers have to check through boxes and file drawers, and sometimes they get it wrong. But the fact is that they don't have -- they in fact do have Arbitration Agreements with SuperValu, which puts them in the Midwest arbitration subclasses, which means that they have only brought claims against C&S with whom they have no arbitration agreement. I mean, they don't have one period, they just don't.

With respect to Blue Goose, I won't go into more detail about the arbitration being waived, but it is remarkable that 19 months after Blue Goose brought their initial complaint and the defendants litigated with Blue Goose it goes back to a motion to dismiss, document production requests, 84,000 pages of responsive documents from Blue Goose, multiple interrogatories, none of which are allowed under the Arbitration Agreement.

THE COURT: Yes, but, I mean, in the interim, in fairness to them, I did in one of my orders say hold off on that arbitration stuff, that's for another day.

MR. DRUBEL: Oh, that was just recently, Your Honor. This is all before that.

THE COURT: Oh, okay. The same discovery issues, which were causing everybody to sort of try to figure out who had agreements with who, obviously, encumbered both sides.

MR. DRUBEL: Well, that may be, Your Honor, but the fact is that well before that issue, before any defendant demanded arbitration with Blue Goose, they served document requests and interrogatories.

Now, if you compare that to the discovery they would get under their Arbitration Agreement, the Arbitration Agreement is specifically limited to just the exchange of key documents, that's it.

THE COURT: Well, I suppose there was some are we fighting global warfare and go big picture or do we start honing in on specific things.

MR. DRUBEL: Well, I think it's just a question of whether or not Your Honor feels it is unfair and prejudicial for defendants to litigate the discovery part of this case, including and --

THE COURT: Start down the road and then switch gears.

MR. DRUBEL: -- and then switch gears 19 months later. Defendants have made absolutely no explanation for why it is they waited so long.

THE COURT: Okay.

MR. DRUBEL: But, in any event, even if there is in fact an arbitration agreement with SuperValu, it simply means that Blue Goose is part of a Midwest arbitration subclass and is suing C&S with whom it has no arbitration agreement.

Millennium; we alleged an Arbitration Agreement with SuperValu but omitted an Arbitration Agreement with Fleming. Mr. Safranski says, well, that Arbitration Agreement was acquired by C&S. I beg to differ, Your Honor.

In looking, in fact, at the bankruptcy orders and in looking at the complete Fleming/C&S Purchase Agreement, it's clear that what happened here was that SuperValu didn't acquire these contracts from C&S. They actually acquired them directly from Fleming. And that's, in fact -- as you look at the paragraph in SuperValu's answer, paragraph 35, that's exactly what that indicates. In any event, assignment of the agreement to SuperValu under the ADA extinguished any C&S arbitration rights going forward.

And this is where the issue of assignment becomes important, Your Honor, because what the defendants are trying to do is say, well, even though there has been an assignment of an Arbitration Agreement, the assignor still has all of his rights of assignment, even though those rights of arbitration have been transferred to the assignee. We don't think that -- I mean, that's Black Letter Law that

that's not the case. The defendants haven't cited any case whatsoever that has held that. In fact, the defendants haven't cited any case whatsoever in which equitable estoppel was used to bring back an assignor who had transferred its arbitration rights to an assignee.

So with respect to Millennium and Village Markets, Your Honor, the fact is that for Millennium they have only sued C&S, which is not a party to Millennium's superseding Arbitration Agreement with SuperValu. And C&S doesn't have -- even if they had rights with respect to the Fleming Arbitration Agreements by assigning them to SuperValu under the ADA, they have lost them. They were extinguished at least with respect to going forward, not with respect to pre-ADA issues.

Village Market is just the reverse. Village Market had a SuperValu Arbitration Agreement, but they assigned it. SuperValu assigned it to C&S under the ADA, and that extinguishes SuperValu's arbitration rights. So when Village Markets sues SuperValu, there is no applicable arbitration agreement there. There just isn't one.

THE COURT: Tell me again what the main case is that I should look to for this extinguishing with the assignment.

MR. DRUBEL: Well, we cite in our brief, Your Honor, the restatement second of contracts. I mean, there

is --

THE COURT: There is no case that's right on point that's going to help me much with that?

MR. DRUBEL: Your Honor, all the case law that's cited in the restatement -- we, frankly, didn't think it was a matter of real dispute. An assignor makes an assignment, transfers their rights and, I mean, doesn't get to both transfer and retain their arbitration rights.

THE COURT: I was looking more for the extinguishment.

MR. DRUBEL: Well, but when you transfer it going forward, it extinguishes your rights going forward. It means that -- for example, if you and I have an arbitration agreement and I assigned it to Mr. Safranski, I don't lose my rights with respect to what happened before, but with what respect -- but with what will happen in the future, post the assignment, I have lost my rights there. I can't both give Mr. Safranski an assignment of the arbitration agreement and still retain it.

THE COURT: Okay. I think I understand what you're saying. I know we have a lot of confusion about Village Market and exactly what their thing is. I didn't quite get through all of the affidavits that came after the fact.

MR. DRUBEL: Well, Your Honor, the fact is there

is no dispute that, in fact, there was an Arbitration Agreement with SuperValu, which was then assigned to C&S. And that's all that matters for the purposes of this motion, because Village Market is in the New England arbitration subclass, which has only sued SuperValu. And there is no applicable arbitration agreement between Village Markets and SuperValu because SuperValu assigned that Arbitration Agreement to C&S as part of the ADA, which is when all of the -- which is when this cause of action accrued.

Remember, the plaintiffs' claims in this case are that the territorial and customers restrictions in the ADA were a violation of the antitrust laws. So when there is a transfer of these customers and a transfer of their contracts and a simultaneous agreement not to compete for them, that's the basis of our claim.

If I could have the third chart, please.

Your Honor, we believe that equitable estoppel has absolutely no application here, and it's for two different reasons applied to two different groups of contracts.

Let me say a little bit, if I could, about the *PRM* case, which applies to the first group, the King Cole and the Blue Goose group, because the claim by the defendants there is that C&S, which is not a party to any Arbitration Agreements with SuperValu, is entitled as a non-signatory to enforce an Arbitration Agreement that it was not a party to,

which under some limited circumstances equitable estoppel teaches us can happen. We understand that. And our position is not by virtue of *Stolt-Nielsen* or anything else that there is no such thing as equitable estoppel. That is not the plaintiffs' position. However, what is the plaintiffs' position is that equitable estoppel applies only in limited circumstances which don't apply here.

In the *PRM* case, which the defendants rely on, the Eighth Circuit said that estoppel typically relies in part on the claims being so intertwined with the agreement containing the arbitration clause that it would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause in that same agreement. Well, the plaintiff in *PRM* sued a non-signatory, Kobe Steel, for tortious interference with license agreements containing arbitration clauses. So the plaintiffs there were actually relying on the agreement in their lawsuit which contained the arbitration clause, the license agreements. Well, the license agreements themselves, which contained the arbitration clause, the Eighth Circuit points out anticipated that an entity, like Kobe Steel, might enter into a licensing agreement with a licensee and that agreement attempted to govern that expected relationship.

So the plaintiff is bringing a tortious

interference claim claiming that the defendant tortiously interfered with the contract that has the arbitration clause in it. And those contracts anticipate that someone like Kobe Steel might come along. The Eighth Circuit cites both of those factors in deciding whether or not equitable estoppel applied. So the intertwinedness there consisted of the fact that the agreement anticipated someone like Kobe Steel; and, two, that the agreements themselves were the subject of a lawsuit. That's not true here. Plaintiffs didn't rely on the Supply Agreements with defendants in formulating their claims. They are not even mentioned in the complaint.

And if you look, Your Honor, at the Supply Agreements and Retailer Agreements that the defendants attach to their motion and their reply, not a one of them mentions pricing, not a one of them. This is not a case where the plaintiffs are suing under the contract because they are arguing that the prices charged under the contract were too high. That has nothing to do with it. The plaintiffs are suing because they were overcharged. Some of them have Retailer Agreements, some of them don't, but none of those agreements specify prices. The plaintiffs' claims don't depend at all on whether or not there is a retail agreement or a supply agreement. In fact, as the Eighth Circuit said, C&S, which is the one who is trying to enforce

these particular Arbitration Agreements, C&S did not sign the agreements, is not mentioned in any of them, and performs no function whatsoever relating to their operation. That's *PRM Energy* saying, look, this is very different than the *Kobe Steel* case, this is not what's going on here, and then citing *Ross* with approval. That's the Second Circuit case that figures prominently in our brief because we think this is very similar to *Ross* where a stranger, C&S, to the Arbitration Agreements with SuperValu is trying to enforce them.

Finally, Your Honor, with respect to the Millennium and Village Markets agreements -- those are the ones where the defendants assign them to each other -- defendants have cited no case, nor can they cite any case, in which equitable estoppel has ever been applied to an assignor namely to allow the assignor of an arbitration agreement to simultaneously transfer and yet retain its right to demand arbitration; no case, and we're not aware of any such case.

THE COURT: I guess I would like you to conclude by just spending a few minutes with me on the dismiss or stay issue. Obviously, you seek a stay. How long would it take to get the result of arbitration, years?

MR. DRUBEL: Well, Your Honor, I really couldn't say. I really couldn't say. At this point, I'd just be

speculating. I would think it would be -- I mean, the fact is it's theoretical.

The plaintiffs here, the individual plaintiffs, could not possibly afford to proceed in arbitration to try to prove their case.

And I will say this -- I only bring it up because Mr. Safranski made the point again and it seemed it might have resonated with Your Honor -- about, well, the assumption is that we would have to start all over, each plaintiff would have to have its own expert, you know, which may not seem to make a lot of sense, but the fact is that the Arbitration Agreements themselves require complete confidentiality. And when we were having some discussions with the defendants initially about the possibility of mediating these arbitration claims, we suggested that we in fact mediate them all jointly, you know, we representing all of the arbitration claims. And what we got back was the following: "Each Mediation/Arbitration Agreement states that the parties agree to keep confidential and not disclose to third parties any information or documents obtained in connection with the arbitration process, including the resolution of the dispute." The defendants then say, "Under this language, each arbitration retailer and each of their counsel are prohibited from disclosing anything regarding the mediation -- including the mediation's existence to

anyone else. As such, your proposed" -- "your proposed," that is the lawyer's, lead counsel's -- "proposed joint representation of all of the arbitration retailers would be incompatible with this confidentiality provision."

THE COURT: Okay. I'm sorry I asked the question. I guess I shouldn't have gone there.

MR. DRUBEL: I mean, Your Honor, the fact is that the defendants have made it very clear that joint representation by lawyers, and presumably also experts, would be prohibited under the language of the Arbitration Agreement. So it doesn't seem fair to me that they should addressed otherwise in front of Your Honor.

THE COURT: Okay.

MR. DRUBEL: Thank you.

THE COURT: Thank you.

Mr. Safranski.

MR. SAFRANSKI: Your Honor, I recognize the Court's comment earlier. How long --

THE COURT: Oh, I will give you five minutes or so.

MR. SAFRANSKI: Five minutes? Okay.

Just a couple points. If I could respond to that last point first, because it's really kind of beside the point. The Mediation/Arbitration Agreements provide for confidentiality, but there is nothing in those agreements

that prohibits two parties from hiring the same expert.

That letter that Mr. Drubel just put up there was talking about mediation. And, obviously, if you are trying to reach a confidential settlement with individual retailers, there is a need to basically try to negotiate with them individually, not on a joint class-wide or group basis. But, in any event, I think the confidentiality provision is something that the arbitrators can decide how to interpret it. But we have never said that they can't have one expert working on different arbitrations. Presumably, that expert is going to be looking at the same data in each of them without the need for third-party disclosure to someone else.

Let me just get back to the overarching point that Mr. Drubel raised, which was -- he raised four issues. He said all of them have to be decided by the Court, and that's simply not true. The Court's review here is actually quite limited because of the express delegation to the arbitrator of the gateway arbitrability issues. Really the Court needs to decide one way another whether there is an arbitration agreement. Clearly, even Mr. Drubel admits that each of the plaintiffs have an Arbitration Agreement that is in force.

THE COURT: At least with one party.

MR. SAFRANSKI: He argues, well, the assignment killed SuperValu's right to arbitration but gave it to C&S.

But the first point is that there is an existing Arbitration Agreement.

The second issue the Court has to reach is either, one, are they making claims against signatories or, two, does equitable estoppel empower or entitle the non-signatory to enforce the agreement. All the arguments with respect to the validity, enforceability, all those things have been delegated expressly to the arbitrator.

Mr. Drubel cited the *Koch* case from the Eighth Circuit to say, well, some of these issues actually are decided by the court. It was interesting, in the *Koch* case it didn't have an express delegation clause like this case does. It didn't have an express clause that says that the arbitrator decides the scope, validity, exploration, termination. We have cited a number of cases that questions of expiration and termination are decided by the arbitrator when there is an express delegation clause.

The other interesting thing about the *Koch v. Compucredit* case is that there was a question of whether the agreement was terminated and if the agreement was terminated, could the other party still enforce arbitration. The Eighth Circuit said, "Even if the underlying credit agreement was terminated by the settlement, such a termination doesn't necessarily release the parties from the obligations of that agreement, including the obligation to

arbitrate. To the contrary, there is a presumption in favor of post-exploration arbitration matters, unless negated expressly or by clear implication." But all that's really beside the point because what we have here is equitable estoppel.

Mr. Drubel brought up this idea of this having an arbitration agreement, let's say, between me and Mr. Drubel. Now, if I were to assign that arbitration agreement to your Honor and Mr. Drubel were to sue me, he would take the position -- or were to sue me to challenge the validity of that assignment, he would take the position that claim is not arbitrable, but that is precisely what doctrines like equitable estoppel were brought about to do, is to make sure that parties can't get around their arbitration agreements by, I guess, basically pleading around them.

I will just be very brief on the *PRM* case. *PRM* was not just a tortious interference case. There was a conspiracy alleged. And the point was that the conspiracy was targeted at the relationship, an undermining of the plaintiff's rights under the relationship that contained the arbitration clause. Mr. Drubel argues, well, the Supply Agreements we put into the record don't contain prices. Actually, that's not entirely true. The Supply Agreements do provide for rebates, which are negotiated, which are the prices -- which go directly to the prices that are being

charged. The plaintiffs' claim here is that the Asset Exchange and Non-Compete Agreements effected the market, gave market power to the signatories of these agreements, and allowed them to extract higher prices in the agreements they'd negotiated in the arbitration clauses.

With that, I think I will rest.

THE COURT: All right. Thank you, Counsel.

I think I'm going to have to make some of my own charts, and graphs, and flows as to who has what agreement with whom and sort this out a bit. And we will try to get you an order as soon as we can. I'm slightly backed up here, but we will get to you here as soon as we can.

Mr. Drubel, it looks like you have something to say.

MR. DRUBEL: I wonder if Your Honor would permit me to hand up the charts?

THE COURT: Anything that was on the screen.

Likewise, Mr. Safranski, I think some things I saw in the brief, but just so we have a separate copy, if you would give that to Forest, that would be helpful.

MR. DRUBEL: Thank you, Your Honor.

(Court adjourned at 2:30 p.m.)

* * *

I, Debra Beauvais, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Debra Beauvais
Debra Beauvais, RPR-CRR